

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINETTE J. GARRISON
Claimant

VS.

BEECH AIRCRAFT CORPORATION
Respondent
Self-Insured

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Docket No. 168,049

ORDER

Claimant requests review of the Award of Administrative Law Judge Shannon S. Krysl entered in this review and modification proceeding on October 12, 1994.

APPEARANCES

Claimant appeared by her attorney, Robert R. Lee of Wichita, Kansas. The respondent, a qualified self-insured, appeared by its attorney, Terry J. Torline of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

By Award dated February 24, 1994, the Administrative Law Judge granted claimant workers compensation benefits based upon a fourteen percent (14%) functional impairment to the body for work-related injuries to the upper extremities. In that Award the Administrative Law Judge found claimant was not entitled to work disability because she had returned to work for the respondent at a comparable wage. Claimant terminated her employment with respondent in April 1994 and filed a request to review and modify the Award previously entered. By Award dated October 12, 1994, the Administrative Law

Judge modified the initial Award to reflect that claimant was now entitled to permanent partial general disability benefits based upon a sixteen percent (16%) "partial work disability". The claimant requested the Appeals Board review that finding of nature and extent of disability. That is the sole issue now before the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified.

The respondent provided accommodated employment to claimant when she returned to work in November 1992 after recuperating from overuse injuries to both upper extremities. From November 1992 to September 1993, claimant worked as a material analyst. Because another individual was assigned data entry, claimant did little data input and performed this job without experiencing problems with her arms. In September 1993, respondent reassigned claimant to a different material analyst position which required her to perform considerably more data input and tear down quadruplicate copies of work orders. Although the purported purpose of the transfer was to provide claimant with an easier job, claimant was not consulted about this reassignment. In her new position, claimant began to experience additional symptoms in her arms and made requests for treatment from a non-company doctor which were either ignored or refused.

Because of a brain tumor, claimant temporarily left work in November 1993. After recuperating from brain surgery claimant returned to work for respondent in February 1994 and was assigned to the position of schedule compliance. In this position, claimant used a computer to determine shortages of parts and then telephoned suppliers to expedite the delivery of needed items. Although claimant spent approximately one-half of her time on the telephone, the job also required significant use of the computer keyboard which aggravated her overuse symptoms. Claimant testified her symptoms increased while performing this job and that she advised her supervisor and respondent's first aid department that she could not perform the job without violating her medical restrictions. Claimant also advised her group manager of her physical problems and was told no other jobs were available. Because of the increased symptomatology in her upper extremities, in April 1994 claimant gave respondent two (2) weeks notice of her termination. After claimant had terminated, claimant's former group manager wrote her in May 1994 to advise that her position temporarily remained opened and he would welcome the opportunity to discuss her ideas about the "work environment". After leaving employment with respondent, claimant began part-time work for her husband, an AMOCO dealer, and now earns approximately \$150.00 per week. Additionally, claimant supplements her income by approximately \$50.00 per week through the sale of Mary Kay products.

Respondent contends claimant is not entitled to a finding of work disability because claimant was provided accommodated work through the date of her termination. Claimant contends she is entitled to work disability because the jobs provided claimant after September 1993 were outside her medical restrictions.

Claimant bears the burden of proof to establish her claim. "Burden of proof" is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

". . . on the claimant to establish claimant's right to an award of compensation and to prove the various conditions on which the

claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

The Appeals Board finds claimant is entitled to permanent partial general disability benefits based upon a work disability after she left work in April 1994. Because she has sustained a "non-scheduled injury", claimant is entitled permanent partial general disability benefits under the provisions of K.S.A. 1991 Supp. 44-510e. The statute provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant's testimony, coupled with that of Ernest R. Schlachter, M.D. who examined claimant both in May 1993 and April 1994, indicates that claimant is unable to perform data input or other forms of data processing without risking additional debilitating injury and increased symptomatology. Therefore, the jobs provided claimant which required data input were inappropriate and did not accommodate claimant's true physical conditions. Claimant's work-related injuries and medical restrictions are significant and substantially affect her ability to perform work in the open labor market. The Appeals Board finds the presumption of no work disability contained in 1991 Supp. K.S.A. 44-510e is overcome.

The parties presented the testimony of two labor market experts, Jerry Hardin and Patricia Perdaris. Claimant's expert, Jerry Hardin, testified claimant has lost thirty-five to forty percent (35-40%) of her ability to perform work in the open labor market and forty-nine percent (49%) of her ability to earn a comparable wage based upon the restrictions of Ernest R. Schlachter, M.D. If one considered the restrictions of Drs. Melhorn and McMaster, claimant has lost thirty percent (30%) of her ability to perform work in the open labor market and forty-one percent (41%) of her ability to earn a comparable wage according to Mr. Hardin. Respondent's expert witness, Patricia Perdaris, testified she believes claimant could perform her former job in schedule compliance and that she has no work disability. However, Ms. Perdaris also believes claimant's loss of ability to perform work in the labor market would be approximately twenty-three percent (23%) and her loss of ability to earn a comparable wage would be forty-six percent (46%), if she could not perform the job in schedule compliance. In formulating their opinions of loss of ability to earn a comparable wage, Mr. Hardin assumed that claimant could now earn approximately \$7.00 per hour and Ms. Perdaris assumed she could now earn wages in the range of \$6.00 to \$7.50 per hour.

Because Ms. Perdaris analyzed claimant's loss of ability to perform work in the open labor market under the mistaken belief that claimant had preexisting medical restrictions for the neck, that opinion cannot be considered by the Appeals Board in determining work disability. Based upon the other opinions of the labor market experts, the Appeals Board finds claimant has sustained a thirty-five percent loss of her ability to perform work in the open labor market and a forty-five percent loss in her ability to earn comparable wage.

The Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied, 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor a greater weight and accordingly they will be weighed equally. The result is an average of the thirty-five percent (35%) loss of ability to perform work in the open labor market and the forty-five percent (45%) loss of ability to earn a comparable wage resulting in a forty percent (40%) work disability which the Appeals Board considers to be an appropriate basis for the Award in this case.

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge as set forth in the Award of October 12, 1994, that are not inconsistent with those expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Review and Modification of Administrative Law Judge Shannon S. Krysl, dated October 12, 1994, should be, and hereby is, modified as follows:

AN AWARD OF REVIEW AND MODIFICATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Linette J. Garrison, and against the respondent, a qualified self-insured, Beech Aircraft Corporation.

As of April 29, 1994, the date of filing of the Application for Review and Modification, the claimant is entitled to a 40% permanent partial general disability based upon an average weekly wage of \$545.60, for 269.57 weeks at the rate of \$145.50 per week or \$39,222.44

As of July 25, 1995, there is due and owing claimant 12 weeks temporary total disability at the rate of \$289.00 per week or \$3,468.00, followed by 133.43 weeks at the rate of \$50.93 per week for a 14% permanent partial general disability in the sum of \$6,795.59, followed by 64.71 weeks at the rate of \$145.50 per week for a 40% permanent partial general disability in the sum of \$9,415.31, for a total of \$19,678.90 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$29,807.13 is to be paid for 204.86 weeks at the rate of \$145.50 per week, until fully paid or further order of the Director.

All other orders of the Administrative Law Judge set forth in the Award of October 12, 1994, are hereby adopted by the Appeals Board for purposes of this review.

IT IS SO ORDERED.

Dated this ____ day of August, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Robert R. Lee, Wichita, Kansas
Terry J. Torline, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
David A. Shufelt, Acting Director